STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Cooper, P.J. and Sawyer, and Owens, JJ.)

ANTONIO CRAIG, a Minor, by his Next Friend, KIMBERLY CRAIG,

Plaintiff-Appellee,

V

OAKWOOD HOSPITAL, a Michigan Corporation,

Defendant,

HENRY FORD HOSPITAL d/b/a HENRY FORD HEALTH SYSTEM,

Defendant-Appellant

ASSOCIATED PHYSICIANS, P.C., ELLIAS G. GENNAOUI, M.D. and AJIT KITTUR, M.D., Jointly and Severally,

Defendants.
_____/

Supreme Court
No. 121405

Court of Appeals
No. 206859

Wayne County Circuit Court
No. 94-410338 NI

REPLY BRIEF BY DEFENDANT HENRY FORD HEALTH SYSTEM

*****ORAL ARGUMENT REQUESTED*****

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I THE LOWER COURTS' IMPOSITION OF SUCCESSOR LIABILITY ON HENRY FORD WAS CONTRARY TO LAW AND POLICY, AND UNSUPPORTED BY SUFFICIENT EVIDENCE.

This Honorable Court granted the Appeal of Henry Ford Health System allowing it to prove that it cannot be liable under a successor liability theory and, further, that Henry Ford cannot be liable for the underlying medical malpractice judgment entered against Oakwood Hospital and Dr. Gennaoui, just as those co-defendants/appellants are entitled to overturn the judgment. Craig v Oakwood Hospital, 469 Mich 880; 668 NW2d 910 (2003). This makes sense; if the underlying medical malpractice judgment is set aside and the case dismissed, there is no judgment to be imposed upon Henry Ford Health System by way of "successor liability" or otherwise.

The level of desperation of plaintiff's counsel in being unable to cogently respond to the arguments of Henry Ford is readily apparent by a review of plaintiff's brief. In that brief, for the first time, plaintiff's counsel engages in a fanciful (and ridiculous) discussion regarding the so-called "waiver" by this defendant when the issue of successor liability was submitted to the trial court. One-half of plaintiff's brief is devoted to an attempt to create "waiver" issues where none exist. MCR 7.306(C) was amended in 2003 specifically allowing for the filing of a reply and, thankfully, Henry Ford has the opportunity to address the distortions and misrepresentations that plaintiff's counsel has foisted upon this Court.

In the trial court Henry Ford filed a motion to sever on December 31, 1996 based upon MCR 2.505(B) which allows the trial judge to order a separate trial of one or more claims or issues (Supplemental Appx 456a-459a). As stated in that motion, Judge Youngblood previously indicated that she would consider severing the successor liability case from the underlying malpractice case. The hearing on the motion was held on January 10, 1997. (Appx 1b -15b.) This was three months before medical malpractice trial started. It is clear from a complete and

fair reading of the transcript of that hearing that if severance was granted, the only issue at a bench trial was successor liability. There was not to be a re-litigation of the underlying malpractice facts. Plaintiff's brief fails to mention the following exchange:

> THE COURT: Okay, having said that I will sever the claim.
>
> MR. SILVERMAN: We just did it as a single issue?
>
> MR. HENK: Right. Let me clarify it. The single issue is the successor liability issue, whatever that entails.
>
> THE COURT: Correct.
>
> MR. HENK: Whatever that means.
>
> MR. SILVERMAN: The single successor liability issue, whatever that entails, concerning Henry Ford Hospital, just write that in and then I'll sign it, okay?
>
> MR. HENK: I'll put . . and the successor liability issues, whatever those entail.
>
> MR. SILVERMAN: Okay.
>
> MR. HENK: The gist of it is we're not going to re-litigate. We agree we're not going to re-litigate the malpractice if you get a plaintiffs verdict. I mean, you can litigate anything else concerning our legal standing, etc., but it's the malpractice that we won't come back and talk about.
>
> THE COURT: I'm sure I won't forget that.
>
> MR. HENK: All right.
>
> MR. SILVERMAN: Then I'm fine. [Appx 9b-10b].

The Court entered the order to sever on that basis. (Appx 16b-17b.) There is nothing in that order stating that defendant waived the right to appeal. There was to be no jury trial or re-litigation of the medical malpractice facts. The sole issue at the bench trial was successor liability "whatever that entails". Obviously, it was plaintiff's burden to make his case at the successor trial (Appx 290a -334a). As Henry Ford has exhaustively analyzed in its brief, plaintiff failed to do so.

Plaintiff's counsel further leaps to the absurd conclusion that because Henry Ford agreed

that Judge Youngblood would remain the judge for the successor liability trial (after the malpractice trial), Henry Ford waived any right to appeal the ruling of Judge Youngblood!

The following is the complete exchange at the hearing on the motion to sever; as is typical, plaintiff's brief does not present the entire record.

> MR. SILVERMAN: No, I have no problem, however, just for saying what might happen in the future; in other words, I am agreeing to waiving jury right, your Honor, however, I do want this Court and this Judge to be the one overseeing this legal issue. And I'd also like you to waive any right to ask if she . . I'm just, you know, foreseeing if something occurs out of the ordinary. In other words, this is the Court, this is the Judge that's going to decide this issue.
>
> MR. HENK: This is where we'll be.
>
> MR. SILVERMAN: Very good.
>
> MR. HENK: This is Judge Youngblood's case, that's where we'll present our proofs.
>
> MR. SILVERMAN: Okay. Then I'm fine with it . . . [Appx 8b - 9b.]

Based upon this exchange, plaintiff's counsel concocts the ridiculous theory that Henry Ford waived any right to appeal the decision of Judge Youngblood! Although probably not even necessary, Henry Ford offers the following response.

At the time of the motion to sever (1997), a reassignment of judges in Wayne County was under discussion and, on September 29, 1997, only 17 days after Judge Youngblood issued her opinion holding Henry Ford liable, the Wayne County Circuit Court issued notice that this case was reassigned from Judge Youngblood to Judge Giovan. (Supplemental Appx 460a.) At the motion to sever, Henry Ford simply agreed that Judge Youngblood would remain the trial judge for the successor trial after completion of the medical malpractice trial and did not in any way, shape or form waive any right to appeal her opinion.

Contrary to the argument plaintiff's counsel now makes, plaintiff's counsel never claimed there was an agreement to and waiver by Henry Ford of its right to appeal. Plaintiff's counsel

never raised the issue of waiver before Judge Youngblood in response to Henry Ford's motion for Judge Youngblood to make new findings and conclusions (Appx 423a), and never raised this issue of waiver in the Court of Appeals, either by way of a motion to strike defendant's claim of appeal, by way of a cross appeal or even as an argument in the Court of Appeals. Finally, plaintiff's counsel never addressed this "issue" of appeal waiver in answer to Henry Ford's application for leave to appeal to this Honorable Court. These issues of waiver (even if they existed) were never raised by plaintiff at any time below, and they are not preserved. Marietta v Cliffs Ridge, Inc, 385 Mich 364; 189 NW2d 208 (1971).[1]

The bottom line is this. There is no legal basis to impose successor liability upon Henry Ford. But even if successor liability were to be imposed in a medical malpractice context, plaintiff's so-called proofs at the successor liability trial were woefully inadequate to meet plaintiff's burden of proof. Michigan Aero Club v Shelly, 238 Mich 401; 278 NW2d 121 (1938). Plaintiff's counsel, aware of these shortcomings, is left with no alternative but to invent issues of "waiver" and distort the record to suit his purpose.

Instead of addressing the arguments of Henry Ford that there can be no successor liability, either legally or factually, the balance of plaintiff's appellate brief similarly contains numerous misrepresentations and distortions of the record. Plaintiff's counsel continually harangues Henry Ford for the contents of the trial record, ignoring that it was plaintiff's burden to present evidence in the trial court to prove a case of successor liability. As plaintiff's counsel stated at the start of the successor trial:

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[1] It is true that the January 12, 1997 motion to sever transcript is not included in Henry Ford's appendix. This omission is not because Henry Ford is trying to mislead the Court (as plaintiff's counsel claims, for example, page 10 of plaintiff's brief), but because the hearing is irrelevant to any of the issues pending before this Honorable Court. This so-called appeal waiver has not been an "issue" over the last seven years in the trial court or in the Michigan Court of Appeals or

THE COURT: Mr. Silverman, would you like to make an opening statement?

MR. SILVERMAN: Would you like me to go first, Your Honor?

THE COURT: Yes, the plaintiff goes first.

MR. SILVERMAN: This is a trial, as you know, arising out of a finding of malpractice now that occurred during the delivery in birth of Antonio Craig . . . : [Appx 292a-293a.]

This trial was like any other trial. Plaintiff had the burden of proving his case and introducing the evidence he believed would do that. The fact that the evidentiary record does not support a finding of successor liability is not the fault of this defendant and cannot be the basis to sustain the judgment imposed by the trial court.

Additional misrepresentations and distortions argued by plaintiff's counsel must be addressed. Contrary to plaintiff's brief, at page 15, the Support Service Agreement was between APMC, P.C. and Associated Physicians Medical Center, Inc. APMC, P.C. was a separate entity which in 1986 continued the medical practice of Associated Physicians, P.C.! There was no purchase contract between Associated Physicians P.C. and Henry Ford. Ignoring these facts, plaintiff's counsel reaches the ridiculous conclusion (unsupported by any facts or case law), that "This unexplained omission gives rise to a reasonable inference of contractually based merger and is substantive evidence of merger". Defendant does not know what plaintiff is talking about.

Due to page limitations, defendant is not able to address each misstatement in plaintiff's brief, but some of the most important deserve correction. Plaintiff states at page 30 of his brief that Henry Ford Health System purchased Associated Physicians, Inc. As is clear from the record, this never happened. Similarly, there is absolutely no proof in the record as plaintiff claims at page 31 of his brief that there was a "cash total stock purchase" by Henry Ford Health System of Associated Physicians. Defendant/appellant hates to belabor the issue, but can only

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in this Court, until plaintiff filed his appeal brief!

point to the actual facts, in the record, that Associated Physicians Medical Center, Inc., a wholly-owned subsidiary of Henry Ford, entered into a Support Service Agreement with APMC, P.C. APMC, P.C. continued the medical practice of Associated Physicians, Inc. All of the claims, arguments and misstatements in plaintiff's brief that there was a direct purchase or contract between Associated Physicians, P.C. and Henry Ford are untrue. Yet, plaintiff uses these made-up "facts" to support his claim that a merger existed to support a judgment against Henry Ford.

Regarding the "notice issue", plaintiff's counsel at page 36 of his brief states that Henry Ford admits notice in the form of letters from attorneys who requested records of plaintiff. All defendant can ask plaintiff's counsel to do is read its brief. The letters of counsel requesting records did not provide Henry Ford with the required notice, and Henry Ford has never admitted this. The Court of Appeals while giving lip service to the notice requirements of Stevens v McLouth Steel, 433 Mich 365; 446 NW2d 95 (1989), ignored the holding in Stevens and determined that nondescript letters from two law firms requesting records was sufficient notice to Henry Ford of a malpractice claim. For those reasons previously stated in the brief of Henry Ford, there was no notice and the Court of Appeals was wrong in determining that there was.

Finally, plaintiff's counsel "encourages" this Honorable Court "to acquaint itself with the history of how hospitals have attempted, legally and illegally, sometimes with a carrot and sometimes with a stick, to establish influence and control referrals from physicians". With no support in the record or any relationship to the facts of this case, plaintiff's counsel then accuses Henry Ford of violations of the "Anti-Kickback Statute" and the "Stark Act", concluding with wild accusations such as, "Obviously, the transaction described herein implicates the Stark Act and should, at a minimum, trigger an inquiry". (Plaintiff Brief, pp 22-24.) Since plaintiff's counsel cannot address the actual facts and law of this case, he is left to desperate (and

unwarranted) attacks upon Henry Ford including accusations of criminal conduct.

II THE OPINION TESTIMONY OF PLAINTIFF'S EXPERT WITNESSES WAS NOT DEMONSTRATED BY PLAINTIFF TO BE RELIABLE UNDER MRE 702, AND/OR WAS BASED ON FACTS NOT IN EVIDENCE.

Plaintiff's argument that Henry Ford waived any challenge to the malpractice verdict is without merit. This argument was not raised by plaintiff below and thus is waived. Marietta, supra. Further, this argument is foreclosed by the directive of this Court, specifically granting leave in this case to Ford to address "Whether the witness' testimony was based on facts not in evidence and whether the trial court erred in permitting the testimony of plaintiff's expert witnesses." Craig v Oakwood Hospital, 469 Mich 880; 668 NW2d 910 (2003).

This waiver argument also has no legal merit. As set forth by Ford in detail in its application for leave to appeal, Ford, as the alleged successor, stood in the shoes of, and is entitled to advance on appeal the same issues raised and preserved below by its alleged predecessor, Associated Physicians, P.C., and agent, Dr. Gennaoui (in which Ford concurred at the time of post judgment motions). See In re Quality of Service Standards, 204 Mich App 607; 516 NW2d 142 (1994) (a surrogate may intervene on appeal to represent its interest, provided that it accepts the dispute in the posture in which it exists, and it does not assert arguments or raise new issues), Losse v Offshore Navigation, Inc, 670 F2d 493 (CA 5, 1982) (when one party has made an objection, it is presumed, unless the contrary appears, that co-parties aligned with him have joined in the objection or offer, and that further objection by co-parties are unnecessary).

Plaintiff has not bothered to argue the merits of the malpractice issues in response to Ford's brief. The arguments raised by plaintiff in response to Oakwood's brief are without merit.

Plaintiff's assertion that the MRE 702 issue of the reliability of Dr. Gabriel's testimony and its specific applicability or "fit" to this case was waived is specious: the burden is on

plaintiff to affirmatively demonstrate reliability and "fit", not on defendants to disprove it. People v Young, 418 Mich 1; 340 NW2d 805 (1983). The issue was raised, and plaintiff was given the opportunity to make this showing, twice, both before and during trial (Appx 33a-45a, T 6: pp 8-20, Appx 108a-109a, T 21: pp 36-37). Plaintiff did not, and could not do so. This was confirmed by concessions by Dr. Gabriel on cross examination showing his opinion to be fundamentally unreliable speculation, without specific application to the record, and facts, of this particular case.

Plaintiff's counsel's characterization of facts appearing in the medical records as purportedly showing this child at birth demonstrated signs of trauma, or injury due to severe oxygen deprivation, cannot provide the facts in evidence necessary to the reliability, and relevance, of his experts' opinions. The inferences urged by plaintiff's counsel are negated by the testimony of plaintiff's own experts: plaintiff's own experts conceded that there were no signs or symptoms of either trauma or oxygen deprivation occurring at or shortly before birth (Appx 80a, Gatewood T 12: 208, Appx 197a-199a, 201a-133a, Gabriel T 13: 126-128, 130-131).

Plaintiff's own experts testified that the very signs which plaintiff's counsel claim to show trauma or injury due to oxygen deprivation (e.g., plaintiff's Oakwood brief, pp 6-7, 14-15, 25-28), were not in fact signs of injury occurring at or near the time of delivery. Evidence of the child's appearance, and tests, which plaintiff's counsel claims to evidence brain damage, were conceded by Dr. Gabriel not to be indicative of when (close to birth or prior to labor), or how the damage had occurred. This was so as to the purported "cortical thumb", the MRI results, and the alleged unusual focus of the eyes (Appx 227a-227b, Gabriel T 13: 156-157). Likewise, the "molding" asserted by plaintiff's counsel to be a sign of trauma was, Dr. Gabriel conceded, normal here and not so severe as to evidence trauma (Appx 201a-202a, T 13: 130-131). The

"head compression" shown by the fetal monitor strips, which plaintiff's counsel argues is indicative of trauma, was normal, indeed "reassuring" from an obstetrical standpoint according to plaintiff's expert (Appx 76a, 95a, Gatewood T 11: 200, T 12: 23).

Further, Dr. Gabriel conceded that in "many cases" if a child like Antonio has been devastated close to delivery by trauma, hypoxic ischemia or any cause, the child would be acutely compromised at the time of delivery. He conceded that, in the absence of evidence of compromise at birth, the devastation must have occurred at period remote from the delivery (Appx 202a, Gabriel T 13: 131). Dr. Gabriel never explained why this cases was different. He could identify no facts in evidence which would reliably support a conclusion that the "devastation," i.e., brain injury, to Antonio Craig occurred at the time of delivery absent any symptoms of acute compromise at that time.

Plaintiff's reliance on testimony by experts (plaintiff's and defense) acknowledging that in some cases Pitocin can cause excessively strong contractions, which in turn can cause trauma, is misplaced. The problem, simply, is that there are neither facts in evidence nor reliable scientific literature or studies which would permit this theory to "fit," or apply to, the specific facts of this particular case.

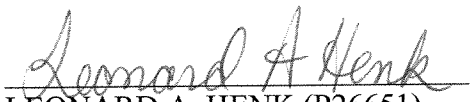
Plaintiff counsel's feverish attempts to characterize Dr. Gabriel's theory as one of reduced blood flow (hypoxia) rather than trauma, is belied by Dr. Gabriel's testimony that the primary component of his theory was direct trauma from the fetal head being ground or pounded against some bone (Appx 91a-93a, 110a-111a, 196a-197a, Gabriel T 11: 19-21, 38-39, 125-126). This pounding/grinding allegedly caused both trauma to the brain, and decreased perfusion, or movement of blood within the brain, because of compression by the pounding/grinding (Appx 90a-91a, Gabriel T 13: 18-19, 126). (As plaintiff's counsel asserts, Pitocin can cause the uterus

to clamp down so as to prevent any flow of oxygenated blood from the mother/placenta to the baby. If prolonged enough this likewise can cause global hypoxia--deprivation of oxygen to all fetal organs, including the brain [Appx 52a-53a, 38a-60a, 64a, Gatewood T 10: 71-72, 129-131, 191]; however, the experts agreed there was no global hypoxia here, because of the absence of any symptoms of such global deprivation [Appx 93a, 193a-201a, Gabriel T 13: 21a, 122a-131a; Appx 72a-74a, Gatewood T 11: 147, 153-155].)

Plaintiff's malpractice and successor cases were both premised on the assertions of counsel rather than facts in evidence or, in the malpractice trial, reliable science. Judgment for Henry Ford should be ordered by this Court.

Respectfully submitted,

KALLAS & HENK, P.C.



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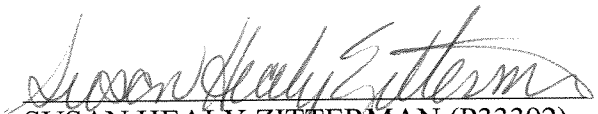

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DATE: JANUARY 23, 2004